

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-1325

To be argued by
RHEA KEMBLE NEUGARTEN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1325

UNITED STATES OF AMERICA,

Appellee,

—v.—

DAVID BELL,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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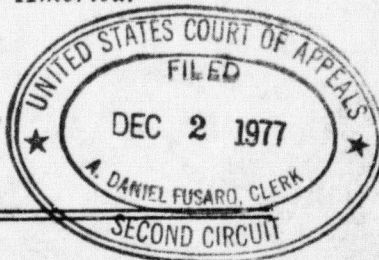


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UNITED STATES OF AMERICA,

Appellee,

—v.—

DAVID BELL,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

David Bell appeals from a judgment of conviction entered on July 12, 1977, in the United States District Court for the Southern District of New York, after a three-day trial before the Honorable Lee P. Gagliardi, United States District Judge, and a jury.

Indictment 75 Cr. 421, filed on April 28, 1975, charged Billy Vernon, David Bell, Lester Bell, Donald Payden, a/k/a "Country," and Jane Doe, a/k/a "Jackie Smith," with conspiracy to distribute cocaine, in violation of Title 21, United States Code, Section 846, and charged Billy Vernon, David Bell and Lester Bell with the distribution of approximately 55.5 grams of cocaine on October 3, 1974, in violation of Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A). The indictment also charged David Bell alone with the distribution of approxi-

mately 6.1 grams of cocaine on October 9, 1974, in violation of Title 21, United States Code, Sections 821, 841 (a) (1) and 841(b) (1) (A).

Trial as to David Bell * commenced on April 11, 1977, and concluded on April 13, 1977, when the jury found defendant guilty on all three counts submitted to it.

On July 12, 1977, Judge Gagliardi sentenced David Bell to a term of five years' imprisonment, to be followed by ten years special parole, on each of the three counts, the sentences to run concurrently, and to a fine of \$10,000 on Count One alone.

Bell presently is at liberty on bail pending appeal.

Statement of Facts

The Government's Case

A. Summary

The Government's evidence showed that on October 3, 1974, David Bell, with the assistance of Billy Vernon and Lester Bell, sold to an undercover officer approxi-

* After the indictment was filed in 1975, David Bell became a fugitive. A bench warrant for his arrest was issued on October 31, 1975, and Bell finally was arrested in Michigan on November 26, 1976. In the meantime, Donald Payden and Billy Vernon were convicted after a jury trial, Jane Doe, t/n Jacqueline Smalls, and Lester Bell, pleaded guilty to the conspiracy count. Each of these four defendants had been sentenced prior to David Bell's trial.

Before the present case was submitted to the jury the indictment was redacted to excise Payden's and Smalls' names, as well as the substantive counts, two through five, which did not name David Bell as a defendant.

mately two ounces of cocaine. Because the cocaine turned out to weigh slightly less than two ounces, on a subsequent day David Bell provided the agent with an additional small amount of cocaine to make up for the previous shortage. The essence of the Government's case was presented through the testimony of Police Officer Chris Jackson, the undercover agent, as well as that of agents on surveillance during the transactions. Finally, the Government introduced David Bell's post-arrest oral confession to the sale of cocaine.

B. David Bell Negotiates With Officer Jackson and Delivers the Cocaine.

On October 3, 1974, Police Officer Chris Jackson, a member of the New York Drug Enforcement Task Force, met in an undercover capacity with Billy Vernon at 116th Street and Lenox Avenue in Manhattan. Jackson, posing as a purchaser, previously had purchased narcotics from Vernon, and the purpose of the October 3rd meeting was to discuss the possibility of purchasing two ounces of cocaine. (Tr. 20).^{*} After Vernon told Jackson that he could get the cocaine, the two men crossed the street under the observation of surveillance officers (Tr. 44, 55) and entered the Soul Expression Restaurant. Shortly thereafter Lester Bell also entered the restaurant. (Tr. 23).

Following a brief private conversation with Lester Bell, Vernon informed Officer Jackson that Lester's brother, David, would bring two ounces of cocaine which would take a "two cut" to Vernon's apartment. (Ibid.). Lester Bell then left the restaurant alone. About twenty

^{*} The abbreviation "Tr." refers to the Trial Transcript; "GX" refers to Government Exhibits; and "Br." to David Bell's brief on this appeal.

minutes later, Jackson and Vernon also departed, and were followed to Vernon's apartment at 125 West 116th Street. (Tr. 23, 44, 55).

Approximately an hour later, Jackson and Vernon were joined in the apartment by Lester and David Bell, who arrived together. (Ibid.).*

The four men entered the kitchen, where Jackson was introduced to the Bell brothers. Thereafter, David Bell quickly took command of the situation. David Bell removed from his jacket pocket a sealed cellophane bag containing cocaine (GX 1; Tr. 60), cut the seal, and poured the contents onto the kitchen table. Jackson questioned David about the weight and was assured by him that the cocaine weighed two ounces. (Tr. 25). As the seller, David Bell snorted some of the cocaine, as did defendant Billy Vernon, who was acting as the purchaser's "representative." (Tr. 25). Both David and Vernon touted the cocaine as of good quality. (Tr. 25-26).

Officer Jackson and David Bell then agreed upon a negotiated price, and Jackson handed \$1900 of preserialized money to David Bell, who, in turn, counted the money. (Ibid.). Just prior to the Bells' departure, Jackson told David Bell he would let him know how the quality of the cocaine turned out. (Tr. 26).

After David and Lester Bell left, Officer Jackson borrowed a scale from Vernon (Tr. 26), weighed the package which David Bell had given to him, and discovered that it

* Officer Jackson could tell the two brothers apart because Lester had a clear complexion and David had a fresh scar. (Tr. 107).

weighed only $1\frac{3}{4}$ ounces. (Tr. 27). Vernon and Jackson then returned to the Soul Expression.*

Inside the Soul Expression, Jackson confronted Lester Bell with the fact that the package was "short" by a quarter of an ounce. (Tr. 27). Lester said he would have to speak to his brother and asked Jackson to wait until David Bell returned. Jackson instead arranged to come back the next day, and then left the restaurant alone. (Tr. 28). **

Despite his original plan to return the next day, Officer Jackson did not go back to the area of 116th Street until October 8, 1974, five days later. He then met with David Bell in front of Jimmy Daniel's Bar on 116th Street, (Tr. 56-57 See Tr. 31-32), the same place where he and Vernon had originally discussed the cocaine deal. (Tr. 20-21). *** Officer Jackson complained to David Bell that the package had been one quarter ounce short, and had not been able to take a "two cut," as promised. David Bell contended that he previously had sold over \$50,000 of the same cocaine, without receiving any complaints. (Tr. 32). Nonetheless, David Bell agreed that if Officer Jackson returned the next day he would give him a quarter ounce of cocaine. (Ibid).

The following day, October 9, 1974, Officer Jackson returned to the Soul Expression Restaurant, which is

* While no surveillance officer identified the Bells entering or leaving 125 W. 116th Street, a dark blue or black Lincoln Continental, with Michigan license plates, was observed double parked in front of the building during part of the time that Jackson was inside. (Tr. 44-45). David Bell later was arrested in that same car. (Tr. 48-49, 73).

** Following Jackson's departure, a surveillance agent went inside the restaurant and saw Lester Bell. (Tr. 45).

*** Surveillance officers who testified at trial also observed this meeting.

directly across from Jimmy Daniel's, (Tr. 32), where he met with David Bell.* Bell promised Jackson he would have the quarter ounce of cocaine within a half hour. (Tr. 32), and then left to drive away in his Lincoln Continental. (Tr. 35). About ten minutes later, Vernon entered the restaurant and talked to Officer Jackson.** Vernon left shortly.

About 15 or 20 minutes later, Officer Jackson saw David Bell's Lincoln Continental pull up outside, and watched David Bell get out of the car and wait in front of the restaurant. (Tr. 34). In response, Officer Jackson left to meet with David Bell. They had a very brief conversation, and David Bell handed Officer Jackson a package containing a small amount of cocaine. (GX 2; Tr. 62). Officer Jackson then drove out of the area. Detective Herbert Wright saw David Bell come into the Soul Expression as he (Detective Wright) was leaving the restaurant only moments after Jackson left.

C. David Bell's Arrest

David Bell was arrested on November 25, 1974, and was immediately advised of his rights. (Tr. 49). The next day, after again being advised of his rights, (Tr. 5), David Bell was interviewed in the United States Attorney's Office. At that time—more than six weeks after the transactions in question—Bell admitted that he had been dealing in cocaine, but said that he had no specific recollection of any particular sale of two ounces. (Tr. 76).

* The previous night David Bell had been observed going into and out of the Soul Expression and Jimmy Daniel's. (Tr. 56).

** A surveillance officer, Detective Herbert Wright, in the meantime had entered the restaurant and sat close to Vernon and Officer Jackson.

D. The Defendant's Case

David Bell, the defendant, did not testify, but called his brother, Lester Bell, in his defense.

Lester Bell, who had earlier pleaded guilty to the conspiracy count of this same indictment, (Tr. 97), offered testimony diametrically opposed to that of Officer Jackson.

On direct examination, Lester Bell admitted that he was then serving a sentence of 15 years to life for kidnapping in the first degree (Tr. 96) and that in 1974 he had received a sentence of probation for possession of a weapon. In response to a question on direct examination, Lester Bell proclaimed that the circumstances of his prior convictions would not in any way "prompt [him] to tell an untruth . . . in court." (Tr. 97).

Lester Bell thereafter testified that without any help from his brother David Bell, he (Lester Bell) had obtained cocaine to sell to Billy Vernon. (Tr. 98-99). According to Lester Bell, while David Bell was in Vernon's apartment when the first transaction took place, (Tr. 99), David Bell did not enter the kitchen. Thus it was Lester Bell's testimony that David Bell did not transfer the cocaine to Officer Jackson and was not even present in the room where Lester Bell transferred the package to Officer Jackson. (Tr. 100). According to Lester Bell, Officer Jackson as well as Billy Vernon, had snorted that cocaine. (Ibid).

Lester Bell admitted that later on Officer Jackson had complained to him that the package was short. (Tr. 100). However, Lester Bell contended that it was he, not his brother David Bell, who had given Officer Jackson the additional cocaine. (Tr. 101). In fact, Lester Bell denied that David Bell had in any way participated in the second transaction. (Tr. 101). Lester Bell also testified that he

had previously told his "story" to Jackson and "the United States Attorney" but that they had not been interested. (Ibid.)

On the brief cross-examination of Lester Bell (Tr. 102-107) he was asked where he had obtained the cocaine which he claimed to have sold to Officer Jackson. Lester Bell initially responded: "It is none of your business where I got the cocaine from." (Tr. 105). After being directed by the court to answer the question, he testified that he had "found it on the street," and admitted that he was aware he was under oath. (Ibid). With that exchange, the Government terminated its cross-examination.

ARGUMENT

POINT I

The District Court Correctly Permitted Inquiry Into The Length Of Lester Bell's Current Sentence.

When it became apparent that Lester Bell might be called as a defense witness, the Government moved, pursuant to Rule 609 of the Federal Rules of Evidence, to permit examination of him with respect to his prior convictions for other offenses.* The Government also requested permission to examine Lester Bell with regard to the lengthy sentence of 15 years-to-life he was then serving, in order to establish, as Judge Gagliardi paraphrased the Government's argument, that Lester Bell

* At the time of his testimony, Lester Bell was serving a sentence of 15 years to life for a first degree kidnapping conviction, and also a concurrent sentence of 5 years for his conviction on the present narcotics indictment. In addition, Bell had been convicted in 1974 of possession of a weapon, for which he had been placed on probation.

readily might perceive himself as having "nothing to lose by committing an additional crime of perjury." (Tr. 68). Defendant raised no objection to the admissibility of the prior convictions (Tr. 68), and no such objection is advanced on appeal. Defendant's sole argument both in the District Court and in this Court is that Judge Gagliardi committed error when he permitted the jury to learn that Lester Bell was serving an extremely lengthy state sentence, and that on his federal narcotics conviction he had received only concurrent time. In the circumstances of Lester Bell's testimony, which purported to extricate his brother fully from the charges in this case by accepting full blame for the cocaine transactions in question, it is clear that the inquiry into the length of Bell's incarceration had a direct bearing on his credibility and motive to lie, and that the district judge did not abuse his broad discretion in ruling that such evidence was admissible.

Defendant's appellate argument proceeds on the erroneous assumption that the admissibility of evidence concerning the length of the sentences imposed on Lester Bell is governed by Fed. R. of Evid. 609. However, Rule 609 only controls the admissibility of the prior convictions themselves—a matter which was not and is not contested.* Evidence of the length of Lester Bell's present incarceration, as well as his understanding of the possibility of concurrent sentences, which had a direct bearing on the witness' motive to lie, thus was governed by the general rules of admissibility of any relevant evidence. Accordingly, Judge Gagliardi properly considered whether to

* Bell's narcotics conviction obviously was admissible under Fed. R. of Evid. 609(a)(2). *United States v. Ortiz*, 553 F.2d 782 (2d Cir. 1977). Similarly, while defendant agreed that the other convictions were admissible, Judge Gagliardi clearly would have been justified in finding them admissible under Fed. R. of Evid. (609)(a)(1). See *United States v. Hayes*, 553 F.2d 824 (2d Cir. 1977).

allow introduction of this evidence under Fed. Rs. of Evid. 401, 402 and 403, which collectively permit introduction of all "relevant evidence," unless the probative value of the evidence is "substantially outweighed" by the danger of confusion or unfair prejudice. And, as this Court, *en banc*, made clear in *United States v. Robinson*, 560 F.2d 507, 513-15 (2d Cir. 1977), the District Court's decision to admit relevant evidence under Rule 403 will be reversed only if the trial judge acted arbitrarily or irrationally.

In deciding to permit inquiry into the length and nature of Lester Bell's sentences, the district judge properly recognized that the length of the witness' sentences, together with the fact that he had received concurrent, rather than consecutive, time for his most recent conviction, clearly were probative of Bell's state of mind and his willingness to lie to save his brother. Obviously, the fact that the witness was serving a substantial sentence of incarceration justified the inference that he had nothing to lose, but everything to gain for his brother's cause, by testifying falsely. Thus, this evidence was clearly probative on the disputed issue of Lester Bell's credibility. Indeed, it would have been grossly unfair to keep from the jury's knowledge the fact that the witness' strong interest in the outcome of the case was coupled with the lack of any fear of the personal consequences of giving false testimony.

Against this background, defendant did not offer—and still has not suggested in this Court—any prejudice in Rule 403's terms stemming to him from this inquiry. The prejudice of which Rule 403 speaks, of course, is in terms of impermissible inferences or confusion of the issues which may result from extraneous or even probative evidence. In this case, since the inquiry only touched upon the witness' credibility and had nothing to do with

the defendant himself, there simply was no danger of any impermissible inference arising that might prejudice defendant David Bell.* Similarly, evidence of the length of Lester Bell's incarceration and its bearing on his credibility, was a relatively simple and obvious matter, and by no stretch of the imagination could be considered remote or confusing.

Moreover, there is nothing inherently prejudicial about sentencing information. Naturally, the principal damage to a witness' credibility arises from the fact of his prior conviction. While, as in the instant case, the length of the sentence properly may further the assessment of the witness' motive to lie and his credibility, the harm to the defendant occasioned by such information is minimal once the jury correctly has learned the critical fact of the prior conviction itself. Cf. *United States v. Mitchell*, 427 F.2d 644 (3d Cir. 1970); *United States v. Ramsey*, 315 F.2d 199 (2d Cir. 1963) (*per curiam*).

Finally, defendant's apparent claim that evidence of the length of Lester Bell's sentence so strongly predisposed the jury against the witness as to have precluded a fair

* In this respect, the cases cited by defendant in his brief, are inapposite since they involved cross-examinations of the respective defendant in each case, which invited the jury to consider the defendant himself a bad person by reason of extraneous matters, and thus created the very type of "prejudice" prohibited by Rule 403. Thus, for example, in *United States v. Tomaiolo*, 249 F.2d 683 (2d Cir. 1957) and *United States v. Bray*, 445 F.2d 178 (5th Cir. 1971), the prosecution engaged in a detailed inquiry into the underlying facts of the prior offenses committed by the defendant and thereby painted a sordid picture of the defendant himself as a person of generally bad character. Similarly, in *United States v. Tumblin*, 551 F.2d 1001, 1004 (5th Cir. 1977) the defendant's past history of repeated incarceration was used to suggest that the defendant "was a young man who had spent most of his young life committing and serving time for crimes, rather than being gainfully employed."

appraisal of his credibility, is simply unfounded on this record. Quite apart from the relevant fact that Lester Bell logically believed he had nothing to lose by committing perjury, the jury readily was entitled to find that his incredible testimony manifested an utter disregard for the truth and a flagrant disrespect for the solemn oath he had taken. Thus, when directed to reveal the claimed source of his cocaine, Lester Bell, in remarkable fashion, responded that he had found the narcotics "on the street!" In the face of this transparent attempt to hide the truth, the only logical conclusion was that this witness would not hesitate to lie for his brother. Accordingly, it was not the fact or length of his record that undermined Lester Bell's credibility, but the substance of his unbelievable testimony.

POINT II

The Prosecutor's Cross-Examination of Lester Bell and Summation Were Proper.

Defendant's second appellate argument—largely cut from the cloth of his first contention—is that the prosecutor misused the evidence of Lester Bell's sentences in the Government's summation, and further compounded the claimed prejudice from this evidence by reminding the witness of the penalties for perjury during cross-examination. Neither of these claims has any merit.

The prosecutor's reference in summation to Lester Bell's lack of credibility, now alleged to have been highly prejudicial, was made without *any objection* from defense counsel, and thus cannot be asserted to require reversal of defendant's conviction. See, *United States v. Braunig*, 553 F.2d 777, 780 (2d Cir.), *cert. denied*, — U.S. —, 97 S. Ct. 2686 (June 6, 1977), and cases cited therein. See also, *United States v. Martinez-Carcano*, 557 F.2d 966,

969 (2d Cir. 1977); *United States v. Garguilo*, 554 F.2d 59, 63 (2d Cir. 1977).

Moreover, read in its full context,* the prosecutor's summation was perfectly fair and proper argument. The prosecutor merely asked the jury to assess Lester Bell's credibility in light of his startling testimony as to the source of the cocaine, his great interest in the outcome of the case, and the witness' arguable lack of anything to lose by taking full blame for the transactions in question. Defendant's present suggestions that this summation

* Defendant's brief (Br. at 11) quotes only two of the three relevant paragraphs from the Government's opening summation. We set forth below the entire portion of the summation relating to Lester Bell and note that defendant omitted the third paragraph from the excerpt quoted in his brief.

"What do we hear from the other side? We hear the unimpeachable testimony of Lester Bell. What do you know about that testimony of Lester Bell? You know that he is a man who is serving 15 to life in the state courts. You know he is the brother of the defendant on trial. You know that when he got convicted of the federal offense and was sentenced after the state court, he didn't get any additional time. And most of all, you know that even after he said he knew about perjury, he knows he is not supposed to lie under oath, he tells you that he picked the cocaine up off the sidewalk.

Now, use your common sense. You know a little bit about the world. You know a lot about the world. Do you believe that testimony? And if you don't believe that testimony, do you believe anything that Lester Bell told you? Hasn't he every incentive in the world to take the weight, to protect his brother? What does he have to lose? He is already serving 15 to life in the state. What does his brother have to lose if his brother is convicted?

And think about another thing too: Lester Bell, when he was asked the question, where he got that cocaine, he didn't want to tell you where he got that cocaine. He said it was none of your business. So wasn't he trying to protect the source of the cocaine? Even with his brother at stake here, what are his motives and interests?" (Tr. 120-21).

somehow placed the prosecutor's credibility in issue and was based on evidence not in the record, simply are unfounded. Indeed, on this record it is difficult to conceive of a more convincing case for a jury, applying its common sense, to have unquestionably rejected at face value the testimony of a witness like Lester Bell.

Similarly, the brief cross-examination of Lester Bell with respect to the consequences of perjury and his knowledge of the elements of the crime (Tr. 104; Tr. 10-11) also was proper. First, this inquiry plainly was invited by defense counsel who, on direct examination, opened the door by eliciting from the witness the statement that nothing would lead him to perjure himself.* The cross-examination thereafter only sought to explore briefly the present circumstances of Bell's incarceration, including the fact that he knew of the sentencing device of concurrent time for subsequent offenses, in order to test the sincerity of the witness' professed claim that there was nothing which could cause him to commit perjury. Second, the question which asked for the witness' understanding of the penalty for perjury as compared to the sentence he was then serving, was objected to by defense

* On direct examination of Lester Bell, defense counsel asked the following question and received the following response:

"Q. Mr. Lester Bell, would the fact, sir, that you are a convicted felon in any way prompt you to tell an untruth before this jury and in court?

A. There is nothing that I can think of would cause me to tell an untruth. Not knowing." (Tr. 97).

Defendant now mistakenly argues that this inquiry directly followed from the trial court's allegedly erroneous ruling to permit evidence of the length of Bell's sentences. The question, of course, was keyed to the fact that Bell was a convicted felon, a matter that defense counsel did not seek to have excluded, and had nothing to do with the length of his sentences.

counsel and sustained by the trial court.* Moreover, this specific question was part and parcel of an argument that Judge Gagliardi earlier ruled was a proper one to make to the jury. (See, Tr. 67-70, 90). Finally, defendant in no way was prejudiced by this limited inquiry. The prosecutor's questions resulted only in the witness' repeated self-serving assurances that he would testify truthfully, and fairly permitted the jury to assess the sincerity of those claims against the substance of Bell's testimony.**

In sum, neither the summation nor the cross-examination of Lester Bell was improper. Defendant cannot now complain about the lack of success in his flimsy effort to avoid conviction by the incredible testimony of his brother.

* "Q. So you realize that you are serving more time already than you could get if you are convicted for perjury?

A. I am serving more time——

MR. BELL: Excuse me, your Honor. Don't answer that. Objection, your Honor.

THE COURT: Yes, sustained." Tr. 104.

** The fact that there is no requirement that the witness be warned about perjury (See, e.g., *United States v. Winter*, 348 F.2d 204, 210 (2d Cir. 1965), cited by defendant (Br. at 12-13)) does not prohibit such warnings. Nor did the warnings lead the witness to refuse to testify, as was the case in *United States v. Smith*, 478 F.2d 976 (D.C. Cir. 1973) and *Webb v. Texas*, 409 U.S. 95 (1972), cited by defendant. To the contrary, rather than being deprived of Lester Bell's testimony, in the instant case Bell's testimony was in no way limited, and the defense was left to contend with the consequences of that testimony.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
 : ss.:
COUNTY OF NEW YORK)

Rhea Kemble Neugarten being duly sworn,
deposes and says that *she* is employed in the office
of the United States Attorney for the Southern District
of New York.

That on the day of
she served a copy of the within
by placing the same in a properly postpaid franked
envelope addressed:

*Edward F. Bell, Esq.
Bell, Hudson & Davis, P.C.
Suite 840-Buhl Building
Detroit, Michigan 48226*

An deponent further says that *she* sealed the said
envelope and placed the same in the mail chute drop for
mailing at One St. Andrew's Plaza, Borough of Manhattan,
City of New York.

Rhea Kemble Neugarten

Sworn to before me this

2nd day of *December* 19*77*

Jeanette Ann Gray

JEANETTE ANN GRAY
Notary Public, State of New York
No. 24-1541575
Qualified in Kings County
Commission Expires March 30, 1979

